

Attachment B

AGREEMENT BETWEEN SAN MATEO COUNTY EXPRESS LANES JOINT POWERS AUTHORITY AND _____ FOR FISCAL AGENT SERVICES

This Agreement entered this ____ day of _____ 2021, by and between the San Mateo County Express Lanes Joint Powers Authority hereinafter called “SMCEL-JPA” and _____ hereinafter called “Consultant”.

WHEREAS, the Joint Exercise of Powers Agreement for the San Mateo County Express Lanes was approved by the City/County Association of Governments (“C/CAG”) Board and the San Mateo County Transportation Authority (“SMCTA”) Board at their board meetings on April 11, 2019 and May 2, 2019, respectively; and

WHEREAS, the First Amended and Restated Joint Exercise of Powers Agreement for the San Mateo County Express Lanes (“JPA Agreement”) was approved by the C/CAG Board and the SMCTA Board at their respective board meetings on June 13, 2019 and July 11, 2019; and

WHEREAS, the JPA Agreement created the SMCEL-JPA to: apply to the California Transportation Commission in order to own, administer, and manage the operations of the San Mateo County Express Lanes; to share in the ownership, administration, and management of any potential future express lanes within San Mateo County; to set forth the terms and conditions governing the management, operation, financing, and expenditure of revenues generated by express lanes in San Mateo County; and to exercise the powers as provided by law (including but not limited to California Streets and Highways Code Section 149.7, as it now exists and may hereafter be amended); and

WHEREAS, an existing bond-funded loan agreement between the San Mateo County Transportation Authority (TA), the Lender, and SMCELJPA, the Borrower, dated September 1, 2020, for which the Lender-issued short-term variable rate tax-exempt bonds in the amount of \$100 million, was secured by other Lender revenue sources and then loaned to the Borrower to fund a portion of the cost to install and equip approximately 22 miles of managed lanes in both directions on US 101 from the San Mateo/Santa Clara County line to Interstate 380 in San Bruno (“Project”); and

WHEREAS, eventual toll revenue from the Project is required by the loan agreement to be placed in funds or accounts established, held, and maintained on behalf of the Borrower by a bank, trust company or other financial institution selected by the Borrower, serving as the Borrower’s fiscal agent by agreement within twelve months following the effective date of the loan agreement; and

WHEREAS, staff to the SMCELJPA have completed a procurement process and identified Consultant as the preferred provider of services; and

WHEREAS, the parties hereto now wish to enter into this Agreement pursuant to which Consultant will render professional fiscal agent services in connection with the Project as hereinafter provided.

NOW, THEREFORE, IT IS HEREBY AGREED by the parties as follows:

- 1. Services.** Consultant shall provide the services as described in Exhibit A (“the Services”), based on the billing rates set forth in Exhibit B, attached hereto and incorporated herein by this reference. This estimate is the basis of this Agreement’s Not to Exceed Amount of \$_____. The consultant will be reimbursed based on costs and/or rates in Exhibit B. In no case shall the cumulative cost of work exceed this Agreement’s Not to Exceed Amount of \$_____.

If additional work is identified, that is not described in Exhibit A, the SMCEL-JPA Board, through the Executive Council, will present the Consultant with a proposed amendment and request a cost proposal. The Consultant will provide the SMCEL-JPA with a cost proposal for the additional specific task applying rates set forth in Exhibit B.

The Consultant shall perform the Services with the same degree of care, skill, and diligence as is ordinarily possessed and exercised by a firm of the same profession currently practicing under similar circumstances. The Consultant will not perform or seek to perform Fiscal Agent Services to any other person or agency in relation to the Project without first obtaining the informed written consent of SMCEL-JPA. No other warranty, express or implied, is included in this Agreement or in any deliverable, in any form or media, produced in connection with the services.

Consultant shall have the right to reasonably rely on information, content, materials, or documents provided to the Consultant by the SMCEL-JPA, or any other Project participants, for the Consultant’s performance of the services under this Agreement; provided; however, that the provider thereof shall remain solely responsible for the adequacy, accuracy or completeness of such information provided.

- 2. Compensation and Method of Payments.** Subject to duly executed amendments, the SMCEL-JPA will reimburse Consultant in performing services as described in Exhibit A based on rates and costs estimate in Exhibit B, which include all applicable surcharges such as taxes, insurance, and fringe benefits, indirect costs, overhead, profit, sub-consultants’ costs (including mark-up), travel (not eligible for separate reimbursement pursuant to the terms of this section 2), equipment, materials and supplies, expenses and any fixed fee. At no point should the total compensation for all work performance be more than the Agreement Not to Exceed Amount of \$_____.

The rates set forth in Exhibit B may not be modified throughout the life of this contract.

Consultant shall submit monthly invoices to the SMCEL-JPA which shall be reviewed by the SMCEL-JPA contract manager and approved by a member of the Executive Council and which shall identify expenditures and describe services performed in accordance with each task listed in Exhibit A. The SMCEL-JPA shall pay to Consultant all undisputed amounts within thirty (30) days of the SMCEL-JPA’s receipt of any Consultant invoice. If the SMCEL-JPA objects to any Consultant invoice, the SMCEL-JPA shall so advise Consultant in writing giving reasons therefor within seven (7) days of receipt of Consultant’s invoice. The SMCEL-JPA shall have the right to receive, upon request, documentation substantiating charges billed to the SMCEL-JPA.

All invoices and/or requests for payments shall be submitted to the SMCEL-JPA contract manager:

San Mateo County Express Lanes Joint Powers Authority
555 County Center, 5th Floor
Redwood City, CA 94063
Attention: Sean Charpentier

3. **Term.** Consultant's services hereunder shall commence on _____, 2021 through _____, 2026, with the option of an additional 5-year extension.
4. **Key Personnel.** Removal or substitution of any key personnel named in Exhibit A will require the prior written notice to SMCEL-JPA. Any substitution shall be with a person of commensurate knowledge and experience, unless otherwise approved by the SMCEL-JPA. Consultant shall maintain records documenting compliance with this Article, and such records shall be subject to audit. Consultant agrees that all personnel assigned to this work will be professionally qualified for the assignment to be undertaken.
5. **Amendments.** SMCEL-JPA reserves the right to request changes in the services to be performed by Consultant. All such changes shall be incorporated in written amendments that specify the changes in work to be performed and any adjustments in compensation and schedule. All amendments shall be executed by the Parties and be specifically identified as amendments to this Agreement. The SMCEL-JPA Executive Council, nor any member thereof, is designated as representative of the SMCEL-JPA for purposes of approving an amendment to this Agreement unless expressly so designated by the SMCEL-JPA Board. For the sake of clarity, any separate agreement between SMCEL-JPA and an affiliate of Consultant shall not in any way be deemed an amendment or modification of this Agreement.
6. **Relationship of the Parties.** It is understood that Consultant is an independent contractor and this Agreement is not intended to, and shall not be construed to, create the relationship of agent, servant, employee, partnership, joint venture or association, or any other relationship whatsoever with Consultant, its employees, agents, and permissible subcontractors, other than that of independent contractor. Consultant acknowledges that SMCEL-JPA has no employees, and neither Consultant nor its employees, agents, or permissible subcontractors acquire any of the rights, privileges, powers, or advantages of SMCEL-JPA employees. Consultant has no authority to contract or enter into any agreement on behalf of SMCEL-JPA without the prior approval of the SMCEL-JPA Board. Consultant has, and hereby retains, full control over the employment, direction, compensation and discharge of all persons employed by Consultant who are assisting in the performance of services under this Agreement. Consultant shall be solely responsible for all matters relating to the payment of its employees, including compliance with social security, withholding tax and all other laws and regulations governing such matters. Consultant shall be responsible for its own acts and those of its agents and employees during the term of this Agreement.
7. **Non-Assignability.** Consultant shall not assign this Agreement or any portion thereof to a third party without the prior written consent of the SMCEL-JPA
8. **Termination.** This Agreement may be terminated by SMCEL-JPA at any time without a requirement of good cause upon thirty (30) days' advance written notice to Consultant. Consultant shall be entitled to receive payment for work/services provided up to the date of termination of the Agreement on a time and materials basis.

SMCEL-JPA may terminate this Agreement for cause. In order to terminate for cause, SMCEL-JPA must first give Consultant notice of the alleged breach. Consultant shall have five business days after receipt of such notice to respond and a total of ten calendar days after receipt of such notice to cure the alleged breach. If Consultant fails to cure the breach within this period, SMCEL-JPA may

immediately terminate this Agreement without further action. The option available in this paragraph is separate from the ability to terminate without cause with appropriate notice described above. In the event that SMCEL-JPA provides notice of an alleged breach pursuant to this section, SMCEL-JPA may, in extreme circumstances, immediately suspend performance of services and payment under this Agreement pending the resolution of the process described in this paragraph. SMCEL-JPA has sole discretion to determine what constitutes an extreme circumstance for purposes of this paragraph, and SMCEL-JPA shall use reasonable judgment in making that determination.

9. **Contract Materials.** At the end of this Agreement, or in the event of termination, all finished or unfinished documents, data, statements and transaction documents, studies, maps, photographs, reports, and other written materials (collectively referred to as “contract materials”) prepared by Consultant under this Agreement shall become the property of SMCEL-JPA and shall be promptly delivered to SMCEL-JPA. Upon termination, Consultant may make and retain a copy of such contract materials if permitted by law or regulation or if automatically saved electronically as part of Consultant’s computer disaster recovery or similar back-up system or internal document retention and business continuity policies and procedures. Any use or reuse of any contract materials by SMCEL-JPA or any third party, whether finished or unfinished, for any purpose other than as specifically intended under this Agreement shall be at the user’s sole risk and without liability or legal exposure to Consultant.
10. **Hold Harmless/ Indemnity.** Consultant shall indemnify and hold harmless the SMCEL-JPA, its board members, agents, officers, and employees from both C/CAG and the SMCTA involved the Project, against all claims, suits or actions of every name, kind, and description to the extent arising out of, pertaining to, or relating to the negligence, recklessness, or willful misconduct of the Consultant, its agents, sub-consultants, officers or employees related to or resulting from the performance, or non-performance, under this Agreement.

The duty to indemnify and hold harmless as set forth herein shall include the duty to defend.

11. Insurance and Financial Security Requirements

Consultant shall, at its own expense, obtain and maintain in effect at all times for the duration of this Agreement the types of insurance stated below, against claims, damages and losses due to injuries to persons or damage to property or other losses that may arise in connection with the performance of work under this Agreement. All policies will be issued by insurers acceptable to the SMCEL-JPA, generally with a Best’s Rating of A- or better with a Financial Size Category of VIII or better.

Consultant or its sub-consultants performing the services on behalf of Consultant shall not commence work under this Agreement until all insurance required under this section has been obtained. Consultant shall furnish the SMCEL-JPA with certificates of insurance evidencing the required coverage and there shall be a specific contractual liability endorsement extending the Consultant’s coverage to include the contractual liability assumed by Consultant pursuant to this Agreement. These Certificates shall specify or be endorsed to provide that thirty (30) days’ notice must be given, in writing, to the SMCEL-JPA of non-renewal, cancellation, or material modification of the policy. At no point should any of the Consultant’s insurance coverage be lower or inferior to the minimum coverage required by SMCEL-JPA

Workers' Compensation and Employer Liability Insurance: The Consultant shall have in effect, during the entire life of this Agreement, Workers' Compensation and Employer Liability Insurance providing full statutory coverage. In signing this Agreement, Consultant Certifies, as required by Section 1861 of the California Labor Code, that (a) it is aware of the provisions of Section 3700 of the California Labor Code , which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of the Labor Code, and (b) it will comply with such provisions before commencing the performance of work under this agreement.

Liability Insurance:

Consultant shall take out and maintain during the life of this Agreement insurance coverages to protect Consultant, its employees, officers and agents while performing work covered by this Agreement from any and all claims for damages for bodily injury, including accidental death, and property damage under this Agreement, to the extent caused by Consultant or by any sub-Consultant or by anyone directly or indirectly employed by either of them. Such insurance shall be not be less than \$1,000,000 for each occurrence unless another amount is specified below and shows approval by the SMCEL-JPA.

Required insurance shall include:	Required Amount
a. Commercial General Liability	\$ 1,000,000 per occurrence and annual aggregate
b. Workers' Compensation	\$ Statutory
c. Professional Liability	\$ 1,000,000 per claim and annual aggregate
d. Motor Vehicle Liability Insurance	\$ 1,000,000 combined single limit per occurrence

The SMCEL-JPA and its officers, agents, employees and servants shall be named as additional insured, with the exception of workers compensation and professional liability, on any such policies of insurance, which shall also contain a provision that the insurance afforded thereby to the SMCEL-JPA, its officers, agents, employees and servants shall be primary insurance to the minimum limits of liability set forth in this Section of the Agreement, and that if SMCEL-JPA, or its officers and employees have other insurance against a loss covered by such a policy, such other insurance shall be excess insurance only.

In the event of the breach of any provision of this section, or in the event any notice is received which indicates any required insurance coverage will be diminished or canceled, SMCEL-JPA may, notwithstanding any other provision of this Agreement to the contrary, immediately declare a material breach of this Agreement and suspend all further work pursuant to this Agreement.

- 12. Non-discrimination.** The Consultant and any sub-consultants performing the services on behalf of the Consultant shall not discriminate or permit discrimination against any person or group of persons on the basis of race, color, religion, national origin or ancestry, age, sex, sexual orientation, marital status, pregnancy, childbirth or related conditions, medical condition, mental or physical disability or veteran's status, or in any manner prohibited by federal, state or local laws.
- 13. Compliance with All Laws.** Consultant shall at all times comply with all applicable laws and regulations, including without limitation those regarding services to disabled persons, including any requirements of Section 504 of the Rehabilitation Act of 1973, state law regarding conflicts of

interest, and the SMCEL-JPA Conflict of Interest Code.

14. **Sole Property of the SMCEL-JPA:** Work products of Consultant which are delivered under this Agreement or which are developed, produced and paid for under this Agreement, shall be and become the sole property of the SMCEL-JPA. Consultant shall not be liable for the SMCEL-JPA's use, modification or re-use of products without Consultant's participation or for purpose other than those specifically intended pursuant to this Agreement.
15. **Access to Records.** The SMCEL-JPA, or any of their duly authorized representatives, shall have access to any books, documents (including electronic), papers, videos voice recording, and records of Consultant, which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcriptions. The Consultant shall maintain all required records for three years after the SMCEL-JPA makes final payments and all other pending matters are closed.
16. **Merger Clause.** This Agreement, including all Attachments are hereto added and incorporated herein by reference, constitutes the sole agreement of the parties hereto with regard to the matters covered in this Agreement, and correctly states the rights, duties and obligations of each party as of the document's date. Any prior agreement, promises, negotiations or representations between the parties not expressly stated in this Agreement are not binding. All subsequent modifications shall be in writing and signed by the Parties. In the event of a conflict between the terms, conditions or specifications set forth herein and those in Attachment A attached hereto, the terms, conditions or specifications set forth herein shall prevail.
17. **Governing Law.** This Agreement shall be governed by the laws of the State of California, without regard to its choice of law rules, and any suit or action initiated by either party shall be brought in the County of San Mateo, California.
18. **Notices.** All notices hereby required under this agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid and addressed as follows:

San Mateo County Express Lanes Joint Powers Authority
555 County Center, 5th Floor
Redwood City, CA 94063
Attention: Sean Charpentier

Notices required to be given to the Consultant shall be addressed as follows:

Name
Title
Company
Address
Address
Contact:

19. **Drafting.** This Agreement was drafted with the joint participation of the parties. Any ambiguity contained in this Agreement shall not be construed against any party as the draftsman, but this Agreement shall be construed in accordance with its fair meaning.

IN WITNESS WHEREOF, the parties hereto have affixed their hands on the day and year first above written.

San Mateo County Express Lanes Joint Powers Authority (SMCEL-JPA)

By: _____
Alicia Aguirre – Chair Date

Approved as to Form:

By: _____
Timothy Fox – Legal Counsel Date

_____ (Consultant)

By: _____
Name - Title Date